Eligibility of Indian Tribes to Administer Programs under the Clean Water and Safe Drinking Water Acts

BACKGROUND: **Indian tribes are sovereign nations, not political subdivisions of states, with a unique legal status and a relationship to the federal government that is significantly different from that of states. Although federal environmental laws create a leadership role for the federal government, they also recognize the concepts of state primacy and tribal sovereignty. While some environmental laws do not explicitly mention Indian tribes, the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA) provide for a tribal role and authorize the Environmental Protection Agency (EPA) to issue regulations describing how it will approve "treatment in the same manner as a state" status for Indian tribes. In authorizing EPA to treat tribes "as States," Congress did not intend to alter their unique legal status or their relationship to the federal government. Rather, the purpose was simply to allow tribes to assume a role in implementing environmental statutes on tribal land comparable to the role states play on state land.**

This information brief focuses primarily on how EPA will determine that an Indian tribe is eligible to administer those CWA or SDWA programs that can be delegated to states rather than on the details of the programs themselves.

STATUTES: **Clean Water Act (CWA). Public Law 92-500, as amended. 33 U.S.C. §1251 *et seq*.**

Safe Drinking Water Act (SDWA). Public Law 93-523, as amended. 42 U.S.C. §300f *et seq.*

REGULATIONS:

40 *CFR* Part 35:	**State and Local Assistance (CWA/SDWA)[1]**
40 *CFR* Part 122:	**EPA Administered Permit Programs: The National Pollutant Discharge Elimination System (CWA)**
40 *CFR* Part 123:	**State Program Requirements (CWA)**
40 *CFR* Part 124:	**Procedures for Decisionmaking (CWA/SDWA)**
40 *CFR* Part 130:	**Water Quality Planning and Management (CWA)**
40 *CFR* Part 131:	**Water Quality Standards; Subpart A - General Provisions (CWA)**
40 *CFR* Part 141:	**National Primary Drinking Water Regulations (SDWA)**
40 *CFR* Part 142:	**National Primary Drinking Water Regulations Implementation (SDWA)**
40 *CFR* Part 143:	**National Secondary Drinking Water Regulations (SDWA)**
40 *CFR* Part 144:	**Underground Injection Control (UIC) Program (SDWA)**
40 *CFR* Part 145:	**State UIC Program Requirements (SDWA)**
40 *CFR* Part 146:	**Underground Injection Control (UIC) Program: Criteria and Standards (SDWA)**
40 *CFR* Part 232:	**404 Program Definitions; Exempt Activities not Requiring 404 Permits (CWA)**
40 *CFR* Part 233:	**404 State Program Regulations; Subpart A - General and Subpart G - Treatment of Indian Tribes as States (CWA)**
40 *CFR* Part 501:	**State Sludge Management Program Regulations (CWA)**

Statutory Background and Implementation History

Amendments to the CWA and the SDWA in the mid-1980's added provisions allowing EPA to treat Indian tribes in the same manner as it does states for the purposes of implementing those laws. Specifically, in 1986 a new section 1451, entitled ''Indian Tribes,'' was added to the SDWA, while in 1987 a new section 518, also entitled ''Indian Tribes,'' was added to the CWA. These new sections required EPA to issue regulations describing how it would implement them to treat tribes in the same manner as states under the CWA and the SDWA.

The initial regulations issued by EPA under these amendments required Indian tribes to go through a two-step process to obtain the authority to implement the CWA and SDWA programs which states were eligible to assume. First, a tribe had to go through a formal prequalification proc-

[1] Acronyms in parentheses indicate the law or laws which provided the authority for that regulation.

ess to be designed eligible for ''treatment as a state.'' Obtaining this status for purposes of a particular CWA or SDWA program did not, however, automatically provide that status to a tribe under other laws or even under other programs of the same law nor did it automatically authorize the tribe to administer that program. Thus, if there was a process which a state had to go through before it could administer a particular program, an Indian tribe, which had been determined to be eligible for ''treatment in the same manner as a state'' status, had to go through that same process before it could be authorized to administer that program. For example, to administer the 404 (i.e., the dredge and fill) permit program, a tribe which had qualified for ''treatment in the same manner as a state'' status for §404 had to submit an application which satisfied the requirements of the 404 State Program Regulations as found in 40 *CFR* 233.

The prequalification process proved to be burdensome, time-consuming, and offensive to tribes. Therefore, in 1992 EPA established a working group to focus on ways to improve and simplify the process to make it easier for tribes to obtain EPA approval to undertake the role Congress envisioned for them under those acts. On November 10, 1992, EPA adopted the working group's recommendations as EPA policy. The purpose of the new policy was to simplify the process for treating Indian tribes in the same manner in which it treats states under several statutes, including the SDWA and the CWA. EPA has since amended several SDWA and CWA regulations (59 *FR* 64339, December 14, 1994) to implement the new policy. These regulatory changes eliminate ''treatment as a state'' review as a separate step and discontinue the use of the phrase ''treatment as a state,'' except where it is necessary because it is used in the laws themselves. Thus, tribes no longer need to go through a prequalification process separate from approval of their basic request for program approval. To the extent that that final rule or its preamble conflicts with previous rules and preambles, the language in it is to be controlling.

Definitions

Definitions pertaining to this subject are included both in the laws themselves and in the regulations implementing the laws although they are not identical in all instances. The two definitions below, from §518(h) of the CWA, are included verbatim in all the regulations implementing it:

- ''Federal Indian reservation'' means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.
- ''Indian tribe'' means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

''Federal Indian reservation'' is not defined in the SDWA, but ''Indian tribe'' is defined in §1401(14) as follows:

- ''Indian Tribe'' means any Indian tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area.

The definition of ''state'' in the CWA and the SDWA does not mention Indian tribes. However, the regulations implementing some sections of these laws have a definition of ''state'' that includes Indian tribes. Although there are minor variations in the definition of ''state'' in the different regulations, the definition in 40 *CFR* 124 (promulgated under both laws) that follows is typical:

- ''State'' means one of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands (except in the case of RCRA), the Commonwealth of the Northern Mariana Islands, or an Indian Tribe treated as a State (except in the case of RCRA).

Eligibility Criteria for Determining That Indian Tribes Can Implement SDWA and CWA Programs

The CWA and the SDWA both use the same general criteria which an Indian tribe must meet in order to be eligible to implement programs that a state can implement.[2] These criteria, which follow, are delineated in §518 of the CWA and §1451 of the SDWA:

- the tribe must be federally recognized by the Secretary of the Interior (recognition criterion);
- the tribe must carry out substantial governmental duties and powers over a federal Indian reservation (governmental body criterion);
- the functions to be exercised by the Indian tribe must be within the area of the tribal government's jurisdiction (e.g., under the CWA the tribe must have appropriate authority over the surface waters of its reservation) (jurisdictional criterion); and
- the Indian tribe must be reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the

[2] A detailed discussion of each of these criteria can be found in the *Federal Register* preambles to the implementing regulations. (See, for example, 58 *FR* 67969 - 67972, December 22, 1993.)

CWA and the SDWA and of all their applicable regulations (tribal capabilities criterion).

Under the simplified process for determining that a tribe is eligible to administer a CWA or SDWA program, EPA intends to ensure compliance with the statutory requirements as an integral part of the process of reviewing program approval applications. Once a tribe has met the four criteria for any CWA or SDWA program, only information unique to another program would need to be provided when a tribe is requesting permission to implement that program.

Recognition and governmental body criteria

The determinations that a tribe has been recognized by the Secretary of Interior and has a governing body are essentially the same under the SDWA, the CWA, and also the Clean Air Act (CAA). To establish that it is federally recognized, a tribe needs only to indicate that it appears on the list of federally recognized tribes that the Secretary of the Interior publishes periodically in the *Federal Register*. A tribe can establish that it meets the governmental duties and powers requirement with a narrative statement describing the form of the tribal government and the types of functions it performs and identifying the sources of the tribe's governmental authority.

The December 14, 1994, final rule (59 *FR* 64339) simplified these determinations by establishing identical requirements for making those showings under the SDWA, the CWA, and the CAA. Thus, the information to meet these criteria needs to be provided only the first time that a tribe applies to assume a program under the provisions of any of these laws. That is to say, once a tribe has been approved to implement any program that a state can implement under any of those statutes, it will not need to demonstrate in subsequent applications that it is federally recognized and governs a reservation. (It will, however, need to meet the other criteria discussed below.) To facilitate review of tribal applications, EPA will request that each application indicate whether the tribe has been approved for ''treatment as a state'' (under the old process) or been deemed eligible to receive authorization (under the revised process) for any other program under these laws.

Jurisdictional criterion

Since a tribe may have jurisdiction over certain activities under the CWA or the SDWA but not others, EPA intends to make a specific determination that a tribe has adequate jurisdictional authority before it approves each tribal program. Under existing regulations for all SDWA regulatory programs and most CWA programs, EPA will not authorize a tribe or a state to operate a program without determining that the tribe or state has adequate authority to carry out those actions required to run the program. Thus, for all SDWA programs and for the CWA's 404 and NPDES programs, EPA will make a determination of whether the tribe meets the statutory jurisdictional requirement as part of EPA's review of the request for approval to assume the program. To show the geographical area over which it has jurisdiction, EPA will expect each tribe seeking program approval to provide a precise description of the physical extent and boundaries of the area for which it seeks regulatory authority. This description should ordinarily include a map and should identify the sources or systems to be regulated by the tribe.

The question of where a tribe may exercise CWA authority has been the subject of significant comment in various rulemakings. Under section 518(e)(2) of the CWA tribes can be deemed eligible to administer CWA programs only for water resources within the borders of the reservations over which they possess CWA authority. EPA believes that this section allows it to recognize tribal authority over non-Indian water resources located within a reservation if the tribe can demonstrate it has the requisite authority over such water resources. EPA considers trust lands formally set apart for the use of Indians to be ''within a reservation,'' even if they have not been formally designated as ''reservations.'' Thus, it is the status and use of the land that determines if it is to be considered ''within a reservation'' rather than the label attached to it.

For the Water Quality Standards program of the CWA, review of tribal civil regulatory authority is not required as part of the standards approval process under §303(c) of the CWA. Accordingly, for that program a comment process, as described below, will be retained. Thus, when EPA receives an application from a tribe for approval to assume implementation of the Water Quality Standards program, within 30 days EPA will notify all appropriate governmental entities of the receipt of the application and the substance of and basis for the tribe's assertion of authority to regulate the quality of reservation waters. ''Governmental entities'' include states, tribes, and other federal entities located contiguous to the reservation of the tribe which has submitted an application to EPA to implement a water quality standards program. Local governments (e.g., cities and counties) are not con-

sidered to be ''governmental entities.'' (See 58 *FR* 67972, December 22, 1993.)

These governmental entities will have 30 days to comment on the tribe's assertion of authority. EPA will not accept comments on whether the tribe meets the other three requirements (i.e., federal recognition, substantial governmental duties and powers, and tribal capability) for eligibility to implement the Water Quality Standards program. EPA will, however, make a finding on those criteria in determining whether the tribe's request to implement that CWA program should be approved. If no comments are offered within that time frame, EPA will conclude that there is no objection to the tribal applicant's jurisdictional assertion. Moreover, to raise a competing or conflicting claim a governmental entity must clearly explain the substance, basis, and extent of its objections. Finally, when questions are raised concerning a tribe's jurisdiction, EPA may, in its discretion, seek additional information from the tribe or the commenting party and may consult as it sees fit with other federal agencies prior to making a determination as to tribal jurisdictional authority, but is not required to do so.

This procedure does not provide states or federal agencies with a veto over tribal applications for authorization to implement the Water Quality Standards program. The procedure is simply intended to identify any competing jurisdictional claims and, thereby, ensure that the tribe has the necessary authority to administer the program it seeks to assume. Moreover, in making its decision EPA will not rely solely on the assertions of a competing regulatory authority, but will make an independent evaluation of the information provided in the tribe's application.

EPA notes that certain disputes concerning tribal jurisdiction may be relevant to a tribe's authority to conduct activities and obtain program approval under several environmental statutes. However, it also believes that once it makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless a subsequent application raises different legal issues. Thus, for example, once EPA has arrived at a position concerning a boundary dispute, it will not alter that position in the absence of significant new factual or legal information. By contrast, however, a determination that a tribe has inherent jurisdiction to regulate activities in one medium (e.g., water) might not conclusively establish its jurisdiction over activities in another medium (e.g., air). EPA will continue to retain the authority to limit its approval of a tribal application to those land areas wher the tribe has demonstrated jurisdiction. Thus, EPA could approve the portion of a tribal application covering certain areas, while withholding approval of the portion of an application addressing those land areas where tribal authority has not been satisfactorily established.

Tribal capabilities criterion

A tribe may have the capability to carry out only some programs under the CWA or the SDWA. The December 14, 1994, final rule (59 *FR* 64339) provided more flexibility for EPA to establish the capability of a tribe to administer specific CWA and SDWA programs. EPA will continue to make a separate determination of tribal capability for each program for which a tribe applies. In evaluating tribal capability, EPA will consider the following:

- the tribe's previous management experience;
- existing environmental or public health programs administered by the tribe;
- the mechanisms in place for carrying out the executive, legislative, and judicial functions of the tribal government;
- the relationship between regulated entities and the administrative agency of the tribal government which will be the regulator; and
- the technical and administrative capabilities of the staff to administer and manger the program.

EPA has stated that a lack of substantial experience administering environmental programs would not preclude a tribe from demonstrating capability, so long as the tribe shows that it has the necessary management, technical, and related skills or submits a plan describing how it will acquire those skills.

CWA and SDWA Programs That Tribes May Assume

Section 518 of the CWA authorizes EPA to treat tribes in the same manner as states for a number of programs including allocation of quantities of water within the tribes' jurisdictions, grants of various types, water quality standards, clean lakes, nonpoint source management, certification, the national pollution discharge elimination system (NPDES), and regulation of the discharge of dredged or fill material into waters of the United States (i.e., the §404 program). EPA has assumed that the list in §518 is not exhaustive and has, for example, determined that tribes may also be given authority to administer other programs that states

can implement (e.g., the sewage sludge management program). Table 1 provides a list of the CWA programs that tribes may implement.

The SDWA authorizes EPA to treat tribes in the same manner as states for applying for grant and contract assistance and for delegation of primary enforcement responsibility for public water systems (PWSs) and underground injection control (UIC) programs. In a December 9, 1987, Notice of Proposed Rulemaking (NPRM) (52 *FR* 46711), EPA proposed to also treat Indian tribes in the same manner as states under two other sections of the SDWA, §1427, ''Sole Source Aquifer Demonstration Program'' (SSAD), and §1428, ''State Programs to Establish Wellhead Protection Areas'' (WHP). Congress has never appropriated any money for either the SSAD or the WHP programs. Consequently, that NPRM will not be finalized, and it has been withdrawn. However, since the WHP programs was not directly linked to a requirement that grants be provided, a number of states and Indian tribes have developed WHP programs on their own based on the law itself.

Table 1. CWA Programs which Indian tribes may administer in the same manner as states.

CWA Program	CWA Citation	CFR[1] Part	*FR*[2] Citation (date)
Allocation of water	Section 101(g)		
Research , investigation, and traning grants	Section 104	40 *CFR* 40, 45, 46	[3]
Grants for water pollution control problems	Section 106	40 *CFR* 35, 35.250–.265 Subpart A	54 *FR* 14354 (4/11/89) 59 *FR* 13813 (3/23/94)
Construction grants	Title II	40 *CFR* 35, in part	55 *FR* 27092 (6/29/90)
Grants for water quality management planning	Sections 205(j)(1–4)	40 *CFR* 35.350–.365	54 *FR* 14354 (4/11/89) 59 *FR* 13813 (3/23/94)
Grants for development and implementation of nonpoint source management programs	Sections 205 (j)(5) and 319(h)	40 *CFR* 35.750–.760	54 *FR* 14354 (4/11/89) 59 *FR* 13813 (3/23/94)
Water quality standards and implementation plans	Section 303	40 *CFR* 131	56 *FR* 64875 (12/21/91)
Water quality inventory	Section 305	40 *CFR* 130.4	54 *FR* 14354 (4/11/89)[4]
Inspections, monitoring, and entry	Section 308	40 *CFR* 233	58 *FR* 8171 (2/11/93)[5] 58 *FR* 67965 (12/22/93)
Federal enforcement	Section 309		58 *FR* 8171 (2/11/93)[6] 58 *FR* 67965 (12/22/93)
Clean lakes	Section 314		54 *FR* 14354 (4/11/89)
Grants for ground-water quality protection	Section 319(j)	40 *CFR* 35	54 *FR* 14354 (4/11/89)
Certification	Section 401	40 *CFR* 124, 40 *CFR* 131	58 *FR* 67965 (12/22/93) 56 *FR* 64875 (12/21/91)
National Pollution Discharge Elimination System (NPDES) (including pretreatment)	Section 402	40 *CFR* 122–125[7], 403, and 501	58 *FR* 67966 (12/22/93)
Dredge and fill permits	Section 404	40 *CFR* 232 and 233	58 *FR* 8171 (2/11/93)
Sewage sludge management	Section 405	40 *CF*R 122, 123, and 501	58 *FR* 67965 (12/22/93)

[1] *CFR = Code of Federal Regulations* part which implements that CWA Program.
[2] *FR = Federal Register* citation and date for regulatory changes.
[3] EPA has determined that tribes are eligible under the major funding provisions of Section 104 regardless of whether they are treated in the same manner as states. Thus, specific regulations were not developed (58 FR 67968, December 22, 1993).
[4] In this notice EPA waived, for Indian tribes, the requirement found in CWA section 305(b) for submission of a biennial report. Thus, regulations indicating how tribes can implement the requirments of section 305 would be superfluous (58 FR 67968, December 22, 1993).
[5] Any tribe which is approved to implement sections 402, 404, and/or 405 of the CWA is automatically eligible tim implement section 308 (i.e., the inspection authority is simply part of the tribe's 404 permit program authorization requirements). Thus, EPA does not plan to issue separate regulations dealing with tribal administration of section 308.
[6] Any tribe which is approved to implement sections 402, 404 and/or 405 of the CWA is automatically eligible to implement section 309. Thus, EPA does not plan to issue separate regulations dealing with tribal administration of section 309.
[7] Specific procedures and criteria for state or tribal assumption of the NPDES program are found in 40 *CFR* 123.

Table 2 lists the SDWA programs that tribes may assume.

Transition in Permitting Authority from EPA or States to Tribes

Some of the CWA programs which tribes may administer involve the issuance of permits. Until a tribe receives permission to administer those CWA programs, either EPA or an authorized state is responsible for them on the tribe's reservation. Thus, when a tribe assumes responsibility for issuing permits, the transition may be either from EPA or from a state.

Regulations that had been finalized before the CWA was amended in 1987 addressed the transition from EPA-issued permits to state-issued permits. Once a tribe has been granted the authority to implement a program that EPA has been issuing permits for, following those pre-1987 regulations will enable an efficient transfer from EPA's permitting authority to that of the tribe.

In other cases, however, a state, not EPA, may be the existing permitting authority for certain CWA activities on a reservation. The regulations implementing §518 include provisions to prove for an orderly transfer of permitting authority from a state to a tribe once an Indian tribe has been authorized to administer a program. (See 40 *CFR* 123.33 and 501.12.) These regulations state that in order to assume a program when the state rather than EPA has been handling permits on reservation land, the Memorandum of Agreement between EPA and the tribe seeking program approval must specify how the tribe and the state will accomplish the transition of permitting authority.

Impact on DOE

The understanding necessary to respond effectively to tribal regulation is basically the same as that needed to respond to federal and state regulation (Slade and Stern 1996). DOE must thoroughly understand the applicable tribal laws or council resolutions, tribal agency regulations, and the tribal regulatory agency's personnel and policies.

If an Indian tribe applies to implement the CWA Water Quality Standards program, DOE facilities that are contiguous to its reservation will be notified of the application. DOE will have 30 days after receipt of the notice to submit comments to EPA's Regional Administrator on whether the tribe has authorization over the surface waters of the reservation. This commenting process will provide DOE with an opportunity to highlight any potential problems that DOE feels may exist with the tribe's assertion of jurisdiction.

DOE facilities are required to comply to the same extent as other persons or entities with duly adopted state or tribal CWA or SDWA standards or approved programs of the state or tribal reservation in which they are located. If a tribe has received approval from EPA to implement a CWA

Table 2. SDWA programs under which Indian tribes may assume primary enforcement responsibility (primacy) or receive financial assistance.

SDWA Program	SDWA Citation	*CFR*[1] Part	*FR*[2] Citation (date)
Public water systems (PWSs) (national drinking water quality standards)	Sections 1412–1416	40 *CFR* 141–143	53 *FR* 37395 (9/26/88)
Underground injection control (UIC)	Sections 1422 and 1425	40 *CFR* 124 and 144–146	53 *FR* 37395 (9/26/88)
Development grants and contract assistance for PWS and UIC (technical and/or financial assistance for primary enforcement responsibility)	Sections 1442–1444	40 *CFR* 35	53 *FR* 37395 (9/26/88)
Sole source aquifer demonstration (SSAD): grants	Section 1427		[3]
Wellhead protection (WHP): grants	Section 1428		[4]

[1] *CFR = Code of Federal Regulations*. Reference in this column is to that section of the *CFR* which implements the indicated SDWA program.
[2] *FR = Federal Register*
[3] In 1987 EPA issued a Notice of Proposed Rulemaking (NPRM) to implement the SSAD grants program. But since no money has ever been appropriated for the grant programs, this NPRM has been withdrawn.
[4] In 1987 EPA issued an NPRM describing how EPA would provide grants for states and tribes to implement wellhead protection programs. Since no money has ever been appropriated for the grant program, this rule will not be finalized. Some tribes and states are, however, developing WHP programs without federal money.

or SDWA program, DOE facilities located within the tribe's reservation will have to comply with standards adopted by the tribe. Thus, any DOE facilities on land that is within an Indian reservation will have to comply with CWA and SDWA programs which the tribe has been authorized by EPA to implement. For example, DOE will have to comply with any water quality standards adopted by Indian tribes that have been authorized by EPA to administer that program. DOE will also have to comply with other CWA and SDWA programs such as the NPDES permits, sewage sludge management, or Public Water Systems programs, of tribes that have been authorized to implement them.

References:

Slade, Lynn H. and Walter E. Stern. 1996. Environmental regulations on Indian Lands—A question of jurisdiction. http://www.lectlaw.com// files/env21

Questions of policy or questions requiring policy decisions will not be dealt with in EH-412 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Air/ Water/Radiation Division, EH-412, (202) 586-9581, or lois.thompson@eh.doe.gov.